EDITOR'S NOTE

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87 552

No:

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN H. LARY, JR.,

Petitioner,

v.

MANSOUR ANSARI and MANSOUR ANSARI ORIENTAL RUGS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

John H. Lary, Jr.
600 St. Clair Street S.W.
Huntsville, Alabama35801
Telephone: 205/533-1510

Petitioner

QUESTIONS PRESENTED

1. May a district court grant summary judgement on the basis of res judicata where trial transcript of prior action is not introduced at hearing?

2. May a plaintiff who earlier lost a civil lawsuit alleging fraud later maintain against the same defendant a second lawsuit alleging RICO violations, where the same fraudulent conduct of defendant underlies both actions, on the theory that civil fraud and RICO violations are sufficiently different so as not to offend doctrine of res judicata?

3. May a plaintiff who earlier lost a civil lawsuit alleging fraud later maintain against the same defendant a second lawsuit alleging conspiracy to commit RICO violations, on the theory that commission of civil fraud and conspiracy to commit RICO violations are sufficiently different so as not to offend doctrine of res judicata?

4. May a plaintiff who earlier lost a civil lawsuit alleging fraud, where defendant lied and denied during deposition the pertinent fact that he had discussed with others his "secret sales," thereby concealing existence of conspiracy with another, later maintain against the same defendant a second lawsuit alleging conspiracy to commit RICO violations, on the theory that defendant's misconduct made it impossible for the conspiracy allegation to be litigated during first lawsuit?

5. May a plaintiff who earlier lost a civil lawsuit alleging fraud, where defendant there successfully interposed the defense of plaintiff's contractual covenant not to sue defendant for failure to perform in connection with their business arrangement, later maintain against the same defendant a second lawsuit alleging civil fraud, RICO violations, and conspiracy to commit RICO violations together with the allegation that the defendant refused, after the completion of the first lawsuit, to perform under the aforesaid contract (thereby voiding the covenant not to sue contained therein), on the theory that the civil fraud or RICO allegations coupled with the allegation of

defendant's subsequent refusal to perform, when taken together, form a cause of action that could not have been litigated in the first lawsuit?

6. May a plaintiff who earlier lost a civil lawsuit alleging fraud later maintain against the same defendant a second lawsuit alleging RICO violations and conspiracy to commit RICO violations, on the theory that plaintiff serves in a quasi-public capacity as a "private attorney general" in a RICO lawsuit?

7. Did the District Court and the Appellate Court err in their refusal to admit and consider an affidavit of a juror at the trial of the first lawsuit introduced by the plaintiff in the second lawsuit, where purpose of the affidavit was not to attempt to impeach the verdict in the first lawsuit but to show that the verdict was based solely on the covenant not to sue and that jury in first action did not reach the ultimate issue of the alleged fraud?

LIST OF INTERESTED PERSONS

1. The Honorble E. B. Haltom, Jr., U. S. District Judge

2. The Honorable James H. Hancock, U. S. District Judge

3. John H. Lary, Jr., Plaintiff-Petitioner

4. Mansour Ansari and Mansour Ansari Oriental Rugs, Inc., Respondents

5. Ahmad Momeni and Momeni, Inc.

6. Stephen E. O'Day and the firm of Hurt, Richardson, Garner, Todd & Cadenhead, attorneys for respondents.

7. Robert S. Lamar, Jr. and the firm of Lamar & McDorman, attorneys for respondents.

8. Norman D. Fiedler, attorney for Ahmad Momeni and Momeni, Inc.

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Petitioner, John H. Lary, Jr., requests that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The unpublished opinion of the United States District Court for the Northern District of Alabama, Northeastern Division, is printed as Exhibit A. The published opinion of the United States Court of Appeals for the Eleventh Circuit is printed as Exhibit B.

JURISDICTION

The judgement of the Court of Appeals was entered June 1, 1987. A timely petition for rehearing of petitioner was denied by the Court of Appeals on July 16, 1987.

STATUTES INVOLVED

Title 18 United States Code, Sections 1961-1968 (Racketeer Influenced and Corrupt Organizations Act); Section 1341 (Mail Fraud); and Section 1343 (Wire Fraud).

STATEMENT OF THE CASE

Beginning in 1978 and ending in December of 1980, Lary and Ansari were in business together selling oriental rugs. The primary sales location was in Atlanta, Georgia, where Ansari lived, and Ansari managed the day to day operations of the business with little supervision from Lary, who lived in Huntsville, Alabama. Lary, whose primary occupation was that of a physician, provided all the money used to open and operate the business while Ansari, whose primary occupation was that of oriental rug salesman and store manager, provided most of the work needed to keep the business operating. Lary owned the business bank account into which all receipts from the sale of rugs were to be deposited and from which sales expenses and inventory purchases were to be paid and from which Ansari received a regular monthly withdrawal of funds. Since the opening of the business in 1978, some of the inventory was fully paid for with Lary's funds while much of it was received on credit or consignment from various oriental rug wholesalers. One of the first rug wholesalers from which the business obtained rugs on credit and consignment, beginning in 1978, was Momeni, Inc., a New York wholesaler whose president is Ahmad Momeni . (Shortly before opening the oriental rug business in Georgia, both Lary and Ansari had visited Momeni's New York wholesale showroom and there discussed with Momeni their business plans.)

Ansari kept an inventory book, of which Lary periodically received a copy, listing by inventory number all the fully paid for rugs but which did not list the unsold rugs obtained on credit or consignment. The records of these unsold credit and consignment rugs were kept in Ansari's desk in Atlanta. Ansari, as a regular business practice, listed and numbered on the inventory book the credit or consignment rugs after they were sold to customers. Ansari, as a regular business practice, kept customer receipts of all rug sales, including sales of credit and consignment rugs, and mailed monthly copies of all such sales receipts to Lary in Alabama.

During 1978 and the earlier part of 1979, Ansari sold rugs, including rugs on credit and consignment from Momeni, deposited all sales proceeds into Lary's business bank account, and notified Lary of all sales. At some time in 1979, Ansari becamed dissatisfied with his business arrangement with Lary and complained to Momeni about

it. Momeni suggested to Ansari that Ansari sell the consignment rugs (of which Lary had no record) from Lary's business premises, deposit the sales proceeds into Ansari's personal bank account or pocket, pay Momeni, Inc. the wholesale cost of the rugs out of those sales proceeds, that Ansari keep for himself the difference between the retail sales price and the wholesale costs of those credit and consignment rugs, and conceal from Lary what was going on. Subsequently, during the later part of 1979 and all of 1980, Ansari, Momeni, Momeni, Inc., and possibly others allegedly did conspired to sell and did sell oriental rugs from Lary's business premises to Lary's customers without Lary's knowledege or consent, paying for sales expenses out of Lary's business bank account (which Ansari controlled as manager of the Georgia oriental rug business) but secretly diverting receipts from those sales into Ansari's personal bank account or pocket. Ansari mailed to Momeni checks from Ansari's bank account to pay for those credit and consignment rugs sold. Ansari continued to mail to Lary copies of the inventory book purportedly containing records of all rug sales, but Ansari ceased entering therein records of sales of credit or consignment rugs. Ansari continued to mail to Lary copies of sales receipts purporting to be copies of all sales receipts, but failed to mail any receipt for the sale of any credit or consignment rug. Ansari continued to mail to Lary bank records of sales expenses purporting to be expenses of rug sales made by Ansari in Lary's behalf but containing in addition sales expenses for the "secret sales" Ansari made secretly in Ansari's and Momeni's behalf. Lary noticed the drop in reported sales and questioned Ansari about this during interstate telephone calls. Ansari blamed the fall off in sales to the poor economy and untruthfully told Lary that there had been a marked reduction in customer traffic through the shop and a marked reduction in rug sales. As a result of those "secret sales," Lary's oriental rug business failed, and as a result Lary sold the business to Ansari in December, 1980 on terms favorable to Ansari, all-the-while still ignorant of the existence of either the conspiracy or the "secret sales."

As part of the termination of that business arangement which had existed between Lary and Ansari, those two parties signed a Termination Agreement which contained these three important provisions:

3(F) That he (Lary) shall make no claim or suit of any kind

against Ansari for any failure of Ansari to perform or comply with the terms of any prior agreement, written or oral, between Ansari and Lary in connection with the business arrangement between Ansari and Lary.

5 The parties agree that Lary shall have the right at any time and from time to time to exchange any of the rugs described in Exhibit "A" hereto for an oriental rugs or rugs belonging to Ansari or his firm or business based on the respective costs of the rugs exchanged.

9 Lary and Ansar agree that the purpose of this agreement is to terminate and liquidate the business arrangement existing between them according to the terms and conditions hereof. However, in the event either party materially breaches any term, covenant, or condition of this agreement, then all the terms, conditions, and covenants hereof shall be of no further force and effect.

In 1983, Lary sued Ansari for breach of that Termination Agreement and for fraud in the inducement of that agreement. During discovery, Lary first learned of the existence of the "secret sales" made by Ansari from Lary's business locations to Lary's customers during 1979 and 1980. Lary amended his complaint to include a fraud allegation on account of those "secret sales." In 1984, that suit went to jury trial in the District Court for the Northern District of Alabama, the Honorable Judge James Hancock presiding. During the trial, Lary first learned that Momeni and Momeni, Inc. were involved in Ansari's "secret sales." (Lary had asked Ansari during deposition several months before the trial if he had discussed these "secret sales" with anyone; Ansari answered in the negative and as a result of that untruthful answer Lary did not seek out information about the activities of thet then-unknown co-conspirators.)

Ansari admitted during the trial that he had engaged in the alleged "secret sales." He claimed that such activity did not violate any prior agreement between the parties but did not deny that it amounted to competition with Lary's oriental rug business.

At the conclusion of the trial, Ansari moved for summary judgement based on paragraph 3(F) of the Termination Agreement, the covenant not to sue. Judge Hancock granted the motion, but allowed the case to go to the jury, after instructing the jury that the Termination Agreement was a complete bar to Lary's claims against

Ansari unless they found that Ansari had somehow caused the Termination Agreement to be void. The jury subsequently returned a verdict in Ansari's favor.

In December, 1985, Lary filed the instant suit, alleging conspiracy to violate the RICO statute and requesting civil damages on account of that conspiracy and violations and the resulting injury to and loss of Lary's business. Lary alleged RICO predicate acts of mail fraud and wire fraud. Before being served with process in this suit and before learning of the existence of this suit, Ansari refused to perform under paragraph 5 of the Termination Agreement, citing Lary's 1983 suit as having voided, under paragraph 9 thereof, the agreement and released the parties from the obligations of the agreement. Lary amended his complaint in the instant suit to include the allegation of that fact of Ansari's refusal to perform under paragraph 5 and the resulting removal of the paragraph 3(F) bar. Lary sued the corporation, Mansour Ansari Oriental Rugs, Inc., on the theory that it was the racketeering associated enterprise and that it was a sham corporation and Ansari's alter ego around which Ansari had cloaked himself.

The defendants moved to dismiss the instant suit. The District Court, the Honorable Judge E. B. Haltom presiding, heard the motion as one for summary judgement, receiving in evidence a copy of Lary's complaint in the prior action, a copy of the judgement, a transcript of the post-trial discussion between Judge Hancock and the attorneys concerning the motion for summary judgement, and a transcript of Judge Hancock's jury instructions. **No transcript of the trial itself was introduced during that hearing.** Judge Haltom refused to allow Lary the introduction of an affidavit made by one of the juror in the prior action in which it was stated that the jury had considered only the issue of the bar of paragraph 3(F) of the Termination Agreement and had decided in Ansari's favor only that issue. After receiving the evidence and hearing the arguments, Judge Haltom granted summary judgement in all defendant's favor, citing res judicata as justification for the dismissal of Ansari and collateral estoppel as justification for dismissal of all other defendants. Lary appealed to the Court of Appeals.

(After the grant of summary judgement by Judge Haltom, Ansari and Mansour Ansari Oriental Rugs, Inc. filed suit against Lary in the Superior Court of Fulton county in the State of Georgia, **Ansari et al. v. Lary, civil action number D-37086**, alleging breach of

the Termination Agreement by Lary on account of Lary's prior action and on account of Lary's present action and further alleging malicious prosecution by Lary in his prosecution of both actions. Lary's motion to dismiss, which the court may rule upon as a motion for summary judgement, is currently pending before the Honorable Judge Jenrette. A ruling on that motion is expected before the Supreme Court rules on this petition for certiorari.)

The Court of Appeals judicial panel reversed and remanded with respect to Lary's claims against Momeni and Momeni, Inc, but let stand the dismissal of Ansari and Mansour Ansari Oriental Rugs, Inc., although it substituted res judicata as the justification for the dismissal of the corporation, which it held to be in privity with Ansari. The panel found collateral estoppel not to apply in this case, since it found that the jury verdict did not necessarily result from a determination of the issue of Ansari's alleged fraud, but could have resulted from the jury's having found in Ansari's favor solely due to the covenant not to sue contained in the Termination Agreement.

Lary timely filed a petition for rehearing with the Eleventh Circuit. That petition was denied on July 16, 1987. Lary now petitions the Supreme Court for a writ of certiorari.

REASONS THE WRIT SHOULD BE GRANTED

I

No Transcript of the Trial in Prior Action Was Introduced at the Hearing.

In **Concordia v. Beadekovic**, 693 F.2d 1073, the Eleventh Circuit Court of Appeals found that:

> Where record consisted of allegations that the issue of assault and battery was litigated in state proceeding, copy of complaintant's counterclaim in state proceeding alleging essentially same facts as in federal civil rights action ..., and copy of judgement in state proceeding denying the complaintant relief on counterclaim, **and record of state court proceeding was not introduced**, evidence did not satisfy minimum requirement, in order to apply

doctrine of res judicata in context of either motion to dismiss or motion for summary judgement, that defense of res judicata appear from face of complaint (emphasis added). Fed. Rules Civ. Proc. Rules 12(b)(6), 56, 28 U.S.C.A., 42 U.S.C.A. Secs. 1983, 1985.

In the instant suit, as in **Concordia**, the evidence before the court does not satisfy the minimum requirement in order to apply the doctrine of res judicata in context of either a motion to dismiss or a motion for summary judgement. Without the trial transcript, neither the district court nor the appellate court knows what was litigated in prior action. In the instant case, as in **Concordia**, the introduction into evidence of copy of the allegations in prior suit and copy of the judgement in prior suit, without introduction of the record of court proceedings, is not enough to satisfy the minimum requirements for the application of doctrine of res judicata.

II

Allegations of Civil Fraud and Allegations of RICO Violations Are Sufficiently Different So As Not to Offend Doctrine of Res Judicata.

The appellate court found that principle of res jucicata barred Lary's claims against Ansari and those in privity with him. But, for a prior judgement to bar a subsequent action under principle of res judicata, four elements must be present:

(1) there must be a final judgement on the merits

(2) the decision must be rendered by a court of competent jurisdiction

(3) the parties, or those in privity with them, must be identical in both suits, and

(4) the same cause of action must be involved in both cases.

I.A. Durbin, Inc. v. Jefferson Nat'l Bank, 793 F.2d 1541, 1549 (11 Cir 1986), **Hart v. Yahama-Parts Distributors, Inc.**, 787 F.2d at 1470, **Lary v. Ansari**, 817 F.2d 1521 (11 Cir 1987).

The court in the instant suit erroneously found that the same cause of action was present in both this suit and the prior litigation. This is clearly wrong, since Ansari's admitted during the prior litigation to competition with Lary in the sale of oriental rugs to the public. That

business competition resulted in an injury to Lary's business that is necessarily compensable under the RICO statute, subsection (c) of Title 18, section 1964 of the U.S. Code, but not necessarily compensable under common law fraud. (i.e., an individual tainted by common law fraud may lawfully compete with other businessmen; an individual tainted by RICO violations may not, for if he does he falls within the net of 18 U.S.C. 1964(c) and is liable thereby for triple damages and attorney's fees.)

In discussing mail fraud, one of the proscribed acts under the RICO statute, the Supreme Court wrote that, "Violations of 18 U.S.C. 1341 and of National Stolen Property Act, 18 U.S.C. 2314, constitute two seperate offenses...even though charges arise from single act or series of acts, as long as each charge requires proof of fact not essential to proof of other," **Pereira v. United States** (1954) 347 U.S. 1, 74 S.Ct. 358. Compare that legal opinion to the instant suit, where violation of the RICO statute and common law fraud claim are seperate offenses, even though claims arise from the same series of acts, because each claim requires proof of fact not essential to proof of other (i.e. the RICO claim requires proof of (1) mail fraud or wire fraud, (2) a pattern of racketeering activity, and (3) the conduct of a racketeering associated enterprise, none of which are required for proof of common law fraud. Common law fraud claim requires proof of damages that are not merely losses due to business competition, while proof of competitive business losses alone will sustain judgement under RICO).

Under RICO, it is the effect on interstate commerce that is punished rather than the underlying racketeering acts, and those underlying acts are enumerated in the act for definitional purposes only and are not gravamen of the RICO offense, **United States v. Forsythe** (1977 CA3 Pa) 560 F.2d 1127. Thus, a RICO claim for damages is not the same cause of action as a common law fraud claim. Accordingly, the fourth test for the application of the res judicata bar is not met.

The Court of Appeals in this instant suit found, at page 2889, that, "Because the jury returned a general verdict in favor of Ansari, we are unable to determine whether the jury found that Lary's claim was barred by the covenant not to sue or whether the jury ruled **on the merits** of Lary's substantive claim (emphasis added). Since the Court of Appeals finds that it cannot determine whether the judgement in the prior suit was "on the merits" or not, the first test for the

application of the doctrine of res judicata is not met. (Of course, this Supreme Court can determine that the judgement of the jury was not "on the merits" by reading the affidavit of one of the jurors introduced by Lary into the trial record but not considered by the district court.)

III

Allegations of Conspiracy and Allegations of Commission of Underlying Offenses Are Different Causes of Action Not Offending Principle of Res Judicata.

It is settled law that the commission of a substantive offense and the conspircy to commit it are seperate and distinct crimes. It is just as settled that acquital of a particular crime does not, on principles of either res judicata or double jeopardy, bar subsequent prosecution for conspiracy to commit the same crime. Since, in the instant suit, Lary charged Ansari with RICO conspiracy as well as with underlying substantive violations of law, the Court of Appeals should at least have allowed Lary's RICO conspiracy claims against Ansari to go forward.

The Appellate Court ruled that, "Although styled as a RICO claim, the complaint here relies on the same allegations of misconduct by Ansari as did the prior suit. The present action against Ansari is therefore barred by res judicata," **Lary v. Ansari**, 817 F.2d 1521. That opinion applies to Lary's claims that Ansari violated subsections (a), (b), and/or (c) of Title 18 Section 1962 of the United States Code. It does not address Lary's claim against Ansari for violation of subsection (d) of that Code section, which reads,"(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section." Lary has alleged that Ansari not only violated provisions of subsections (a), (b), and (c) of Title 18 section 1962 of the U.S. Code but also that he conspired with Momeni and others to violate those provisions (i.e., that he violates subsection (d) as well). Since conspiracy to commit RICO violations is a different crime from committing the RICO violations, a finding that res judicata precludes Lary from prosecuting his claims under subsections (a), (b), and (c) does not preclude Lary from prosecuting his claims against Ansari under subsection (d).

Lary alleged Ansari's part in the RICO conspiracy, argued it before the district court, and briefed it in his appeal to the Eleventh

Circuit (See page 9, paragraph 2 of Lary's brief and page 2 paragraph 1 and page 4 paragraphs 2 and 3 of Lary's reply brief) Lary argued that conspiracy is a different cause of action from that of the common law fraud that was litigated in the prior suit. The court of appeals did not address that question in its opinion, mentioning the conspiracy only in passing. Lary again argued that difference between conspiracy and common law fraud in his petition for rehearing and again that question was not answered (see page *iv* and page 1, paragraph 1 of Lary's petition for reconsideration). Lary again raises the same unanswered arguments here.

A conspiracy is a combination of two or more persons to accomplish some unlawful purpose, or some lawful purpose by unlawful means, **United States v. Heck**, (1974 CA9 Cal) 499 F.2d 778, cert den 419 U.S. 1088, 95 S.Ct. 677, 678, **Pettibone v. United States**, (1893) 148 U.S. 197, 13 S.Ct. 542. "Conspiracy ordinarily consisted in uniting to violate any provisions of federal criminal and regulatory statutes of United States," **United States v. Bell** (1943, DC Cal) 48 F Supp 986. "The commission of a substantive offense and a conspiracy to commit it are seperate and distinct crimes," **United States v. Boyle** (1973) 157 App DC 166, 482 F.2d 755, 24 ALR Fed 144, cert den 414 U.S. 1076, 94 S.Ct. 593, **United States v. Bradley**, (1970 CA6 Ky) 421 F.2d 924, **Morrison v. Hunter** (CA10 Kan) 161 F.2d 723. "Aquittal on an accessory count does not bar a conviction on a conspiracy count based on the same facts," **United States v. Braverman** (1975 CA7 Ill) 522 F.2d 218, cert den 423 U.S. 985, 96 S.Ct. 392. "Ordinarily, acquittal of particular crime does not, on principle of res judicata, operate as bar to prosecution for conspiracy to commit the crime," **Woodman v. United States**, (1929, CA5 Tex) 30 F.2d 482, cert den 279 U.S. 855, 49 S.Ct. 351, **Enrique Rivera v. United States** (1932 CA1 Puerto Rico) 57 F.2d 816, **United States v. De Angelo** (1943 CA3 NJ) 138 F.2d 466. "Acquittal of particular crime does not, on theory of former acquittal or jeopardy, bar subsequent prosecution for conspiracy to commit crime," **United States v. Williams** (1951) 341 U.S. 70, 71 S.Ct. 581.
"Acquittal on 18 counts of indictment charging scheme to defraud, and using mails to carry out such scheme, did not prevent conviction on count charging conspiracy to defraud by use of mails," **Morris v. United States** (1925 CA8 Ark) 7 F.2d 785, cert den 270 U.S. 640, 46 S.Ct. 205. "Prosecution under 18 U.S.C. 1962(d) for

conspiracy to engage in racketeering and 1962(c) for substantive offense of racketeering did not violate defendant's double jeopardy rights," **United States v. Smith**, (1978 CA5 Fla) 574 F.2d 308. Under a related racketeering statute, the court wrote that, "Verdict of acquittal on substantive offense under 18 U.S.C. 1955 is not inconsistent with conspiracy conviction," **United States v. Fiorella** (1972 CA2 NY) 468 F.2d 688, cert den 417 U.S. 917, 94 S.Ct. 2622, reh den 419 U.S. 885, 95 S.Ct. 156.

In the instant suit, the Court of Appeals wrote that, "Lary further alleges that Momeni and Momeni, Inc. conspired with Ansari." Conspiracy is a two way street; if Momeni conspired with Ansari then Ansari must have conspired with Momeni. Since Momeni and Momeni, Inc. are to stand trial, Ansari (and his corporate alter ego, Mansour Ansari Oriental Rugs, Inc.) should stand trial alongside for his role in violations of subsection (d) of 18 U.S.C. 1962 and subsection (c) of 18 U.S.C. 1964.

Since a conspiracy is "a partnership for criminal purposes in which each member becomes agent for every other member," **United States v. Heck**, supra, a judgement against Momeni or Momeni, Inc. would be collectable from Ansari or any other co-conspirator, although it would require yet another trial to establish Ansari's role in the conspiracy if Ansari were not to be a defendant in this action beside Momeni. Judicial economy is reason enough to settle the dispute between the litigants in this one suit, rather than this suit plus another, all dealing with the same set of facts. There would be, additionally, the danger of inconsistent results in two trials, one for Momeni and Momeni, Inc. and another for his co-conspirator Ansari.

IV

Respondent's Fraudulent Concealment of Pertinent Conspiracy Facts During Prior Litigation Should Not Profit Him Here.

Lary alleged in his complaint, chapter III paragraphs 1F and 1G, that he did not learn of the conspiracy until December 4, 1984 (a date during the trial of the first lawsuit) and that he was prevented from learning of its existence earlier because of Ansari's untruthful sworn statements. Lary argued that point before the district court at the May 29, 1986 hearing (see page 27 line 18 through page 28 line 1 of the

hearing transcript), introduced evidence of those untruthful statements by Ansari by filing a sworn affidavit coupled with a copy of Ansari's pertinent untruthful answer at his deposition in the prior suit, again argued that point in his brief to the court of appeals (see pages 12 and 13 of Lary's brief and pages 4 and 5 of Lary's reply brief). Both the district court and the court of appeals ignored that point in their decisions and made no mention of it. In his petition for rehearing, Lary again raised that point (see page v and page 1 of that petition) to no avail. The district court and the court of appeals merely admonish Lary that he had a full and fair oportunity to litigate all issues in the prior litigation, but do not explain how Lary could have litigated there issues that had been fraudently concealed by Ansari's untruthful sworn statements and were therefore unknown at the time of trial. Since neither the district court nor the court of appeals addressed or answered that point, Lary raises it again here.

During his sworn deposition in the prior action Ansari concealed the existence of the conspiracy between himself and Momeni by untruthfully denying that he had ever had any conversations with anyone about the "secret sales" that formed the basis for the prior litigation. Since, due to Ansari's false answers at deposition, the conspiracy claim against Ansari and his co-conspirators was not and could not have been litigated in the prior action, the Supreme Court should reverse and remand to the district court at least the conspiracy claim against Ansari. To allow Ansari to profit from his fraudulent denial under oath of pertinent facts, where such untruthful denial concealed the existence of the conspiracy, is to invite wholesale fraud upon the courts of the United States. If frauds upon the courts are to be tolerated and rewarded, rather than punished, then what will become of our system of justice?

V

Fraud Allegations And Breach of Contract Allegations Taken Together Form Cause of Action That Could Not Have Been Litigated in Prior Action.

Lary alleged in his amended complaint that Ansari, subsequent to his victory in the prior litigation and before the district court dismissal of the instant action, refused to perform under paragraph 5 of the Termination Agreement. Lary argued that point before the district

court at the May 29 hearing (see page 23 line 2 through page 24 line 23 and page 25 line 23 through page 26 line 4 of the transcript of that hearing). Lary again argued that point in his briefs before the appeals court (see page 5 and pages 9 through 11 of Lary's brief and pages 1 and 4 of Lary's reply brief). The decision of the court of appeals states only that, "...first lawsuit had provided oportunity to litigate claims, and recent violation of termination agreement had been alleged in amended claim only to overcome barrier posed by covenant not to sue," but did not explain how that "recent violation" could have possibly been litigated at a time when it had not yet occurred. Lary again raised this point in his petition for rehearing (see page vi and page vii of that petition). Lary again raises it here.

Ansari's refusal to comply with paragraph 5 voids the Termination Agreement under the terms of paragraph 9 thereof and denies to Ansari any further protection afforded by the covenant not to sue contained in paragraph 3(F). It was the protection of that covenant which had shielded Ansari and given him his victory in the prior litigation, as is clearly shown by the affidavit of a juror in that case, which introduction was attempted by plaintiff but not allowed by the district court judge in this action. Even if one ignores the affidavit, the court of appeals noted that it could not be determined from the judgement whether Lary's claim had been barred by covenant not to sue or had been defeated on the merits.

Since Ansari's breach of paragraph 5 of the Termination Agreement did not occur until after the completion of the prior litigation, it obviously could not have been litigated there and the effects of that breach on Ansari's defense of the covenant not to sue could not have been felt. Unless the Supreme Court is to allow Ansari to enjoy the benefits of the Termination Agreement without having to perform his obligations thereunder, Ansari should have to here face the fraud allegations coupled with the later breach of Termination Agreement allegations. Those fraud allegations plus the breach of Termination Agreement allegations form a cause of action different from the cause of action litigated in the prior suit, since different evidence is needed to sustain a verdict in each case and since different wrongs are alleged in the two suits.

VI

RICO Plaintiff Serves as Private Attorney General.

The Supreme Court found in **Sedima v. Imrex**, 105 S.Ct. 3275 (1985), that under RICO plaintiff serves as a "private attorney general" and as an adjunct to overburdened public officials in prosecuting violations of the law. It is not the law that a public official is to be bound in his official capacity by restraints that he must conform to in his strictly private capacity. A public official who lost a private civil lawsuit to a defendant cannot be barred by principle of res judicata from prosecuting in his official capacity same defendant for same offense in a later RICO trial. Since Lary, in his quasi-official role as "private attorney general," attempts here to prosecute Ansari for his quasi-criminal RICO offenses, the bar of res judicata should not be raised against Lary.

VII

Introduction of Affidavit of Juror Should Have Been Allowed.

The district court should have allowed the introduction of the affidavit of a juror in the prior action. That affidavit did not attempt to impeach the verdict in prior action; it did show that the jury verdict in the prior action did not reach the question of the fraud alleged there but instead addressed only the defense raised by the defendant Ansari. Since the bar of res judicata is not absolute and should not be allowed where ends of justice or public policy would be twarted and since it is settled principle that courts should decide disputes, where possible, by deciding ultimate issues, consideration of affidavit might have caused district court to deny defendant the protection of res judicata.

CONCLUSION

The writ should be granted.

Respectfully submitted,

John H. Lary, Jr.
600 St. Clair Street S.W.
Huntsville, Alabama 35801
Telephone: 205/533-1510

Petitioner

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

JOHN H. LARY, JR.,	)	
	)	
Plaintiff,	)	
	)	
-v-	)	NO. CV 85-HM-5778-NE
	)	
MANSOUR ANSARI, AHMAD MOMENI; MANSOUR ANSARI ORIENTAL RUGS, INC., a Georgia corporation; MOMENI, INC., a New York corporation	)	**ENTERED** MAY 30 1986
	)	
Defendants.	)	

ORDER

The above entitled civil action came to be heard in the courtroom of the Federal Courthouse in Huntsville, Alabama on May 29, 1986, commencing at 2:00 P.M., for oral arguments on defendants' motion for summary judgement with respect to all claims assered by the plaintiff against defendants in the above entitled civil action. A federal court reporter was present and all proceedings recorded.

Upon consideration of such motion for summary judgement, all evidentiary matter offered in support thereof and in opposition thereto, the pleadings, briefs and oral arguments on behalf of the parties and stipulations made of record, the Court is of the opinion that defendants' motion for summary judgement is due to be granted for the reasons appearing and dictated of record in the May 29, 1986 hearing. The Court expressly finds and determines that there is no

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Defendants filed 12(b)(6), Fed. R. Civ. P., motion to dismiss and other Rule 12 motions and presented factual matters outside the pleadings in support thereof. Accordingly, the Court treated the 12(b)(6) motion as one for summary judgement and gave the requisite Rule 56, Fed. R. Civ. P., notice of submission.

genuine issue of material fact in this litigation, that defendants are entitled to judgement in their favor as a matter of law and that there is no just cause or reason for delay in entry of final judgement herein in favor of defendants. It is therefore ORDERED, ADJUDGED and DECREED that defendants' motion for summary judgement in their favor with respect to all claims herein asserted by plaintiff against defendants in the above entitled civil action be and the same hereby is GRANTED and ENTERED, that plaintiff have and recover NOTHING of defendants in this action, and that costs are taxed against plaintiff, for which let execution issue. And it is further ORDERED, ADJUDGED and DECREED that defendants' motion for the imposition of monetary sanctions against plaintiff in this case is herebyDENIED.

DONE and ORDERED this 30th day of May, 1986.

E. B. HALTOM, JR.,

UNITED STATES DISTRICT JUDGE

EXHIBIT B

John H. LARY, Jr., Plaintiff- Appellant,

v.

Mansour ANSARI; Ahmad Momeni; Mansour Ansari Oriental Rugs, Inc., a Georgia corporation; Momeni, Inc., a New York Corp., Defendants-Appellees.

No. 86-7416

United States Court of Appeals,
Eleventh circuit.

June 1, 1987

Appeal from the United States District Court for the Northern District of Alabama.

Before GODBOLT, VANCE and JOHNSON, Circuit Judges.

PER CURIAM:

John Lary brought this RICO action against Mansour Ansari, Masour Ansari Oriental Rugs, Inc., Ahmad Momeni, and Momeni, Inc. The district court granted summary judgement to all defendants on the grounds of res judicata and collateral estoppel. We affirm as to defendants Ansari and Mansour Ansari Oriental Rugs, Inc. and reverse and remand as to defendants Momeni and Momeni, Inc.

FACTUAL BACKGROUND

In 1978 Lary and Ansari entered into a business relationship under which they bought and sold oriental rugs. Lary provided the capital for the business, and Ansari, who was experienced in the oriental rug business, managed the business. In December 1980 Lary and Ansari entered into a written termination agreement in which Lary agreed, among other things, not to bring an action against Ansari for any claim arising out of their former business relationship.

Lary filed an action in federal court against Ansari in 1983, alleging fraud and breach of agreements between the parties concerning their former business relationship. The district judge instructed the jury that it could not reach the merits of Lary's claims unless it first found that the covenant not to sue in the termination agreement was void and unenforceable. The jury returned a general verdict in favor of Ansari. No appeal was taken from the ensuing judgement.

Lary brought the present action in 1985. Although couched in terms of RICO, the action does not differ from Lary's fraud claim in his previous suit against Ansari. Lary alleges that although Ansari had agreed in their original business arrangement not to engage in other business activities or to compete with the business, he sold oriental rugs "on the side" and kept the profits for himself. Lary further alleges that Momeni and Momeni, Inc. conspired with Ansari to supply him with the rugs that he sold for his own account.

[1] The defendants filed a motion to dismiss the action, which the district court treated as a motion for summary judgement. (1) After a full hearing the court granted the defendants'\motion for summary judgement on the grounds that the claim against Ansari was barred by res judicata and the claim against the remaining defendants was barred by collateral estoppel. Lary appeals from this judgement.

ANSARI AND MANSOUR ANSARI
ORIENTAL RUGS, INC.

The court held that Lary's RICO claim against Ansari was

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(1) The court converted the defendants' motion into one for summary judgement and instructed the parties to submit any other relevant materials. The court, however, did not specifically inform Lary of the consequences of default, and thus did not fully comply with the notice requirements of Fed. R. Civ. P. 56(c). *See Griffith v. Wainwright*, 772 F.2d 822, 825 (11 Cir. 1985). Nevertheless, Lary attended the hearing and presented his case as fully as if he had received proper notice; the court's oversight was therefore harmless error. *Property Management & Investments, Inc. v. Lewis*, 752 F.2d 599, 605 (11 Cir. 1985).

barred by res judicata. Under the doctrine of res judicata (or claim preclusion), a final judgement on the merits bars the parties from relitigating issues that were or could have been raised in the previous action. *I. A. Durbin, Inc. v. Jefferson Nat'l Bank*, 793 F.2d 1541, 1549 (11th Cir. 1986). For a prior judgement to bar a subsequent action, four elements must be present: "(1) there must a final judgement on the merits, (2) the decision must be remndered by a court of competent jurisdiction, (3) the parties, or those in privity with them, must be identical in both suits; and (4) the same cause of action must be involved in both cases." *Id.*

The first three elements are clearly met--a final judgement on the merits was rendered was rendered by a court of competent jurisdiction in Lary's action against Ansari in 1983. The only issue is whether the cause of action asserted in this action is the same as that involved in the earlier lawsuit. We find that it is.

In his first lawsuit Lary alleged that Ansari had fraudently induced him to enter into a too-favorable termination agreement, breached provisions of the termination agreement relating to the recovery of of certain rugs and payments due Lary, defrauded him by improperly withdrawing funds from their oriental rug business, and defrauded him by selling oriental rugs for his own account and not depositing those funds in the business bank account and by concealing that fact when they negotiated the termination agreement.

[2] Because Lary had an opportunity in his first lawsuit to litigate claims relating to his business relationship with Ansari, any future claims relating to the same business relationship are barred by res judicata. Although styled as a RICO claim, the complaint here relies on the same allegations of misciduct by Ansari as did the prior suit. The present action against Ansari is therefore barred by res judicata.

Lary contends that there is another element to this suit against Ansari that could not have been brought in the first suit, and therefore he is saved from the res judicata bar. In his amended complaint he alleges that Ansari had violated the termination agreement by refusing to exchange certain oriental rugs in March and April of 1986 (2). If

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(2) Lary filed his amended complaint on the day of the hearing on the defendants' motion for summary judgement. Although the district

Lary intended to persue this amended claim as an independent cause of action, it would not be barred by res judicata. As Lary essentially admits in his brief on appeal, however, the only purpose of the amended claim is to get around the barrier posed by the covenant not to sue in the termnation agreement so that he can litigate the underlying fraud claim (3). Lary's action against Ansari is therefore barred by res judicata, and the district court did not err in granting summary judgement to Ansari (4).

[3] Mansour Ansari Oriental Rugs, Inc. did not come into existence until after Lary and Ansari had terminated their business relationship. It could not have participated in any conspiracy during their business relationship. Lary explained at the hearing on the defendants' motion for summary judgement that he named the corporation as a defendant because it was simply a continuation, in corporated form, of Ansari's oriental rug business. The corporation was therefore in privity with Ansari, and Lary's action against it is barred by res judicata. *See I.A. Durbin, Inc.*, 793 F.2d at 1549; *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir.), *cert. denied*, 423 U.S. 908, 96 S.Ct. 210, 46 L.Ed.2d 137(1975) (5).

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judge discussed the amended complaint at the hearing, he did not formally allow the complaint to be amended. Given the liberal amendment policy embodied in Fed. R. Civ. P. 15(a) and the court's discussion of the amendment at the hearing, we will treat the amendment as having been allowed. *See Lone Star Motor Import, Inc. v. Citroen Cars Corp.*, 288 F.2d 69, 75 (5th Cir. 1961).

(3) Lary's argument that "[t]he R.I.C.O. isue joined with the issue of Ansari's 1986 breach of [the termination agreement] forms a single cause of action" is not persuasive.

(4) Lary's argument that res judicata should not be applied to bar RICO actions and that application of res judicata bar in this case would result in injustice are without merit.

(5) Although the district court held that Lary's claim against the corporation was barred by collateral estoppel, the judges comments during the hearing on the defendants' motion for summary judgement were cast in res judicata terms.

MOMENI AND MOMENI, INC.

The district court held that Lary's action against Momeni and Momeni, Inc. was barred by collateral estoppel. Collateral estoppel (or issue preclusion) prevents relitigating of an issue of fact or law that has been litigated and decided in a prior lawsuit. *I.A. Durbin, Inc.*, 793 F.2d at 1549. Collateral estoppel applies only if the following prerequisites are met:

> (1) [T]he issue at stake must be identical to the one involved in the prior litigation; (2) the issue must have been actually litigated in the prior suit; (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgement in that action; and (4) the parety against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding.

Id.

[4] Three of these prerequisites are clearly met--Lary's claim relating to the secret sales, whether fashioned as a common law fraud or RICO claim, was involved in the prior action, and Lary had a full and fair opportunity to litigate, and did in fact litigate, the claim in the earlier proceeding. The only issue is whether the determination of the fraud claim in the prior litigation was a "critical and necessary part of the judgement." Because we cannot answer this last question, Lary's action against Momeni and Momeni, Inc. is not barred by collateral estoppel.

In Lary's original lawsuit against Ansari the district court instructed the jury that it could not consider Lary's substantive claims, including the fraud claim, unless it first found that the covenant not to sue in the termination agreement was void or unenforceable. The judge explained that the covenant was enforceable only if Ansari had not breached a material provision of the termination agreement or had fraudently induced Lary to enter into the agreement.

Because the jury entered a general verdict in favor of Ansari, we are unable to determine whether the jury found that Lary's claim was barred by the covenant not to sue or whether the jury ruled on the merits of Lary's substantive claims. Resolution of Lary's fraud calim therefore was not a "critical and necessary part of the judgement" in the original action, and a collateral estoppel bar of the claim is inappropriate in this case. *See In re Merrill*, 594 F.2d 1064, 1067

(5th Cir. 1979) (6).

The district court did not consider whether Lary's RICO claim states a claim against Momeni and Momeni, Inc., and therefore we do not. This is for the district court in the first instance.

AFFIRMED in part, REVERSED in part, and REMANDED.

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(6) The defendants contend that the same fraudulent conduct was the basis for both Lary's fraudulent inducement claim and his underlying substantive fraud claim and thus was a necessary part of the prior judgement. This contention is without merit. Lary conceded when he was arguing against Ansari's motion for a directed verdict in the original case that his fraudulent inducement claim was based entirely on Ansari's alleged misreppresentation to Lary that he was "broke."

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 86-7416

JOHN H. LARY, JR.,

Plaintiff-Appellant,

versus

MANSOUR ANSARI; AHMAD MOMENI;
MANSOUR ANSARI ORIENTAL RUGS, INC.,
a Georgia corp.; MOMENI, INC., a New York
corp.,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Alabama

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion JUNE 1, 11 Cir., 1987, ____F.2d_____)

(JUL 16, 1987)

Before GOLDBOLT, VANCE and JOHNSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Robert D. Vance
United States Circuit Judge

EXHIBIT D

TITLE 18 UNITED STATES CODE

Sec. 1341. Frauds and swindles

Whoever, having divised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Sec. 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false of fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or iimprisoned not more than five years, or both.

Sec. 1961. Definitions

As used in this chapter---

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or

dealing in narcotic or other dangerious drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code, Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal invesigations, section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transporation of wagering pharaphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement fron union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerious drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Peurto Rico, any territory or possession of the United States, any political subdivion, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not in a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which ocurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeeringactivity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State of political subdivision thereof, or which is unenforceable under State of Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the busines of lending money or a thing of value at a rate usurious under State of Federal law, where the usurious rate is at least twice the enforceable rate;

(7) racketeering investigator" means any attorney or invesigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering invesigation" means any inquiry conducted by any racketeering invesigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designed may use in investigations authorized by this chapter either the investigative provisions of this chapter or the invesigative power of such department or agency otherwise conferred by law.

Sec. 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering

activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest; directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities or the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering acitivity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do no confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly, or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Sec. 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claim and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

Sec. 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce, or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this

section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory peformance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

(e) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the coutr may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(f) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(g) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

Sec. 1965. Venue and processs

3(a) Any civil action or proceeding under this chapter against any person may be instituted in the disrict court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

Case No. 87-552

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

JOHN H. LARY, JR.,
Petitioner,

vs.

MANSOUR ANSARI AND
MANSOUR ANSARI ORIENTAL RUGS, INC.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Stephen E. O'Day
(Counsel of Record)
HURT, RICHARDSON, GARNER,
TODD & CADENHEAD
999 Peachtree Street, N.E.
Atlanta, Georgia 30309-3999
(404) 870-6440

Attorneys For Respondents

RESPONSE TO QUESTIONS PRESENTED FOR REVIEW

Because the first question presented for review is raised for the first time in Petitioner's Petition for Writ of Certiorari and was not raised at any point in the proceedings below, it is inappropriate for review by this Court. Questions 6 and 7 presented by Petitioner are not implicated in this case as they do not speak to the issue of res judicata which was the basis of the Eleventh Circuit's opinion. The remaining questions (as well as all subsidiary questions which might ultimately be relevant to a disposition of the case by this Court) can be fairly reduced to the following question:

(1) May a plaintiff who earlier lost a lawsuit alleging fraud, which resulted in a trial by jury, a general verdict and a judgment on the merits by

a court of competent jurisdiction later bring a second suit against the same defendant under the Racketeer Influenced and Corrupt Organizations Act when that second suit is based on the same allegations and arises out of the same operative facts as the prior suit?

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SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari seeking review of the Eleventh Circuit's opinion in this case should be denied as the elements of res judicata are subject to no disagreement among the Circuits and involve no important questions of Federal law. Furthermore, the Eleventh Circuit correctly found the elements of res judicata to have been met in this case.

STATEMENT OF THE CASE

The facts which give rise to the Petition for Writ of Certiorari seeking review of the Eleventh Circuit's opinion in this case are briefly and plainly set out in the factual findings made by the Eleventh Circuit. The statement of the case provided by the Petitioner resorts to material outside the record and as a

result is argumentative and largely hypothetical. The Court therefore is referred to the factual background of the case as set forth by the Eleventh Circuit, which is briefly highlighted and embellished here.

In 1978, John H. Lary, Jr. (hereinafter referred to as "Lary") and Mansour Ansari (hereinafter referred to as "Ansari") entered into a business relationship under which they bought and sold oriental rugs from a showroom in Atlanta, Georgia. Lary provided the capital for the business while Ansari provided his knowledge of oriental rugs and managed the business. In December 1980 Lary and Ansari terminated this relationship by entering into a written termination agreement in which Lary agreed to make no claims or suits of any kind against Ansari stemming from their

business venture in return for Ansari's payment of cash and rugs.

On August 12, 1983, Lary filed suit in the U.S. District Court of the Northern District of Alabama alleging that Ansari had conducted "secret sales" of rugs and had thereby defrauded Lary of his share of the profits achieved from these sales. The 1983 suit filed by Lary alleged fraud, breaches of agreements between the parties concerning their former business arrangement and breach of the December 7, 1980 termination agreement. The case was tried to a jury and a general verdit was returned in favor of Ansari on December 4, 1984, with judgment entered on December 6, 1984. No appeal was taken from the judgment.

On December 4, 1985, Lary again filed suit against Ansari and his

corporation, Mansour Ansari Oriental Rugs, Inc., Respondents herein. Although Lary couched this suit in terms of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C.A. § 1961, et seq., the suit alleged virtually identical claims to those advanced in the suit tried to a verdict the previous year. The 1985 suit alleging violations of RICO arose out of the same operative nucleus of fact as the 1983 suit. In both suits Lary sued Ansari for allegedly breaching the parties' original agreement by competing with the business by selling oriental rugs "on the side" and keeping the profits for himself.

In response to the second suit Respondents filed a motion to dismiss the action which the District Court treated as a motion for summary

judgment. After a full hearing the District Court found in favor of Respondents expressly holding that Lary's claims against Respondents were barred by res judicata. Lary appealed this ruling to the Eleventh Circuit Court of Appeals, which affirmed the ruling that Lary's claims in the 1985 suit against Respondents were barred by res judicata.

REASONS WHY THE PETITION SHOULD BE DENIED

Lary has petitioned this Court to review this case on the application of the doctrine of res judicata, a time-honored and well established doctrine of law. There is no important question of Federal law decided by the Eleventh Circuit in this case which should be settled by this Court, nor is

there any disagreement which this Court need resolve among the Circuits concerning the elements of the res judicata doctrine.

Res judicata comprises two doctrines: claim preclusion or "true" res judicata and issue preclusion commonly referred to as collateral estoppel. The former is clearly a bar to Lary's present claim against Respondents. Under res judicata, when a defendant obtains a judgment in his favor, the plaintiff's claim is extinguished and the judgment acts as a bar to further litigation of that claim. Kasper Wire Works, Inc. v. Leco Engr'g. and Mach., Inc., 575 F.2d 530, 535 (5th Cir. 1978); C. Wright, A. Miller & E. Cooper, Federal Proc. and Prac.; Jurisdiction § 4402. A final judgment on the merits precludes the

parties or their privies from relitigating issues that were or could have been raised in a prior action. I.A. Durbin, Inc. v. Jefferson Nat. Bank, 793 F.2d 1541, 1549 (11th Cir. 1986).

It is accepted in all circuits without disagreement that four elements must be satisfied for res judicata to bar a subsequent suit:

(1) There must be a final judgment of the merits;

(2) The decision must be rendered by a court of competent jurisdiction;

(3) The parties or their privies must be identical in both suits; and

(4) The same cause of action must be involved in both cases.

Hart v. Yamaha-Parts Distributors, Inc., 787 F.2d 1468, 1470 (11th Cir. 1986); Davis & Cox v. Summa Corp., 751 F.2d 1507 (9th Cir. 1985); N.L.R.B. v. United

Technologies Corp., 706 F.2d 1254 (2nd Cir. 1983); Hall v. F.E.R.C., 691 F.2d 1184 (5th Cir. 1982); Lovell v. Mixon, 719 F.2d 1373 (8th Cir. 1983); Prospero Associates v. Burroughs Corp., 714 F.2d 1022 (10th Cir. 1983). This Court has ruled on the issue of res judicata on numerous occasions, one of the most recent being Migra v. Warren City School District Board of Education, 465 U.S. 75, 104 S.Ct. 892, 79 L. Ed. 2d. 56 (1984). In that case, this Court stated the rule followed by the Eleventh Circuit herein - that res judicata forecloses relitigation of matters which were or could have been raised in a prior suit. Id. at 77, n. 1.

In the present case, the prior lawsuit resulted in a trial to a jury, a general verdict and a judgment on the merits rendered by a court of competent

jurisdiction. "A nonspecific, general verdict is acceptable even in a case alleging multiple theories of liability, if each of the several theories is sustained by the evidence and legally sound." Jones v. Miles, 656 F.2d 103, 106, (5th Cir. 1981). Ansari was a defendant in both cases based on complaints alleging the same claims and relying on the same allegations of misconduct by Ansari. The only difference in the present suit from the suit filed in 1983 is that Lary now alleges violations of RICO and makes claims against both Respondents. However, the present complaint still relies on the same allegations of misconduct by Ansari as did the prior suit and the RICO allegations clearly could have been brought in the first suit.

> Appellent cannot avoid preclusion by grounding his second action on a different theory of liability. Claim preclusion extends not only to the precise legal theory presented in the previous litigation, but to all legal theories and claims arising out of the same "operative nucleus of fact." Olmstead v. Amoco Oil Company, 725 F.2d 627, 632 (11th Cir. 1984).

Hart v. Yamaha-Parts Distributors, Inc., 787 F.2d at 1470-71; accord, Interstate Pipe Maintenance, Inc. v. F.M.C. Corp., 775 F.2d 1495 (11th Cir. 1985). This aspect of res judicata is well established and is not subject to any disagreement among the Circuits. Questions two through five of Petitioners Questions Presented For Review are clearly barred by res judicata as they are merely different theories of liability predicated upon the same business transaction arising out of the same operative nucleus of fact as the prior suit.

The claims herein are barred not only against Ansari but also against Mansour Ansari Oriental Rugs, Inc., (the corporation formed after the termination of the business relationship between the parties in order to carry on the oriental rug business) as it is in privity with Ansari. I. A. Durbin, Inc., 793 F.2d at 1549; Aerojet-General Corp. v. Askew, 511 F.2d 710, 719 (5th Cir. 1975), cert. denied, 423 U.S. 908, 96 S.Ct. 210, 46 L.Ed.2d 137 (1975).

In Petitioner's Question Six, Lary describes himself as a "private attorney general" in litigating his claims under RICO against Ansari and cites as authority this Court's decision in Sedima v. Imrex Co., ___ U.S. ___, 105 S.Ct. 3275, (1985). Sedima is inapplicable to Lary's theory as nowhere in Sedima was it suggested that RICO

overrides established res judicata principles by allowing relitigation of claims that have already been determined adversely in previous litigation. As shown above, Lary's allegations of fraud, which are a necessary element of his RICO claims, were alleged, tried, and determined adversely by a jury in the prior litigation. Lary would be precluded from bringing the same issues in a subsequent suit whether or not he is viewed as a "private attorney general" or as a private citizen.

In Petitioner's Question Seven, Lary proposes that the district court and the appellate court erred in their refusal to admit and consider an affidavit of a juror at the first trial. It is accepted in Federal courts without disagreement that the inquiry into the validity of a verdict or the proffering

of an affidavit or testimony of a juror is clearly proscribed. Fed. R. Evid. 606.

Petitioner's Question One raises the issue of whether a District Court may grant summary judgment on the basis of res judicata where the trial transcript of the prior action is not introduced at the hearing. This issue was not raised in Lary's appeal to the Eleventh Circuit and is raised for the first time in this Petition. As such it is not a proper issue for review by this Court. Youakim v. Miller, 425 U.S. 231, 96 S.Ct. 1399, 47 L.Ed.2d 701, (1976). Further, sufficient evidence of the verdict and judgment in the first case was presented to the district court by submission of the transcript of the proceedings of Civil Action Case No. CV-83-H-5554-NE entitled John H. Lary, Jr., Plaintiff v. Mansour Ansari, Defendant.

The issues in this lawsuit and the prior suit are identical and are grounded upon the same business relationship existing during 1978 through 1980. Specifically, Lary's fraud and RICO claims are based upon the same allegedly fraudulent conduct raised against Mansour Ansari in the first lawsuit and could have been presented in that lawsuit. These claims were submitted to a jury and decided against Lary. This second suit, arising out of the same operative nucleus of fact, therefore is barred by res judicata as to Respondents Mansour Ansari and Mansour Ansari Oriental Rugs, Inc.

CONCLUSION

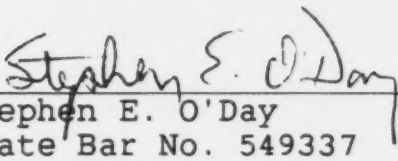
Because the elements of res judicata, which the Eleventh Circuit held to have been met in this case, are

subject to no disagreement among the Circuits and involve no important questions of Federal law, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

DATED: This 30th day of October, 1987.

Respectfully submitted,

HURT, RICHARDSON, GARNER, TODD & CADENHEAD



Stephen E. O'Day
State Bar No. 549337

Attorneys For Respondents

1400 Peachtree Place Tower
999 Peachtree Street, N.E.
Atlanta, Georgia 30309-3999
(404) 870-6440

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court, and that three (3) copies of the foregoing Brief in Opposition to Petitioner's Petition for Writ of Certiorari were served on October 30, 1987, by United States Mail, first class, with proper postage prepaid and affixed, on all parties required to be served as follows:

John H. Lary, Jr.
600 St. Clair Street, S.W.
Huntsville, Alabama 35801

Dated this 30th day of October, 1987.

Stephen E. O'Day

87-552

Case No. 87-~~522~~ 552

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

JOHN H. LARY, JR.,
Petitioner,

v.

MANSOUR ANSARI AND
MANSOUR ANSARI ORIENTAL RUGS, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

John H. Lary, Jr., Petitioner
600 St. Clair Street S.W.
Huntsville, Alabama 35801
205/533-1510

EDITOR'S NOTE

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REASONS THE PETITION SHOULD BE GRANTED

Ansari is indeed correct that res judicata precludes relitigation of an issue that was or could have been litigated in prior action. I. A. Durbin, Inc. v. Jefferson Nat'l Bank, 793 F.2d 1541 (11 Cir. 1986). Even assuming the absence of overriding public policy considerations sufficient to avoid that preclusion, what Ansari and the Eleventh Circuit have still failed to show, however, is how Lary could possibly have litigated his conspiracy claim against Ansari at a time when, due to Ansari's untruthful answers at deposition, the very existence of the conspiracy was unknown. Is there now a new maxim of law that allows parties to profit from fraudulent misconduct during discovery? And, since conspiracy is a different crime from the underlying offenses, Lary's conspiracy claim against Ansari is a different cause of action from his earlier common law fraud claim, even though these two causes of action share some common elements. "The commission of a substantive offense and conspiracy to commit it are seperate and distinct crimes," United States v. Boyle, 157 App DC 166, 482 F.2d 755, cert denied 414 U.S. 1076, 94 S.Ct. 593. "Ordinarily, acquittal of a particular crime does not, on principle of res judicata, operate as bar to prosecution for conspiracy to commit the crime," Woodman v. United States, 30 F.2d 482 (1929 CA5 Tex), cert denied 279 U.S. 855, 49 S.Ct. 351. "Acquittal of particular crime does not, on theory of former acquittal or jeapardy, bar subsequent prosecution for conspiracy to commit crime," United States v. Williams, 341 U.S. 70, 71 S.Ct. 581.

Lary's present common law fraud claim against Ansari now contains the indispensable element of Ansari's 1986 breach of the Termination Agreement (this element is indispensable because Ansari won prior lawsuit by raising defense of the covenant not to sue contained in the Termination Agreement, a defense that is no longer available to him because of his 1986 breach). Accordingly, present common law fraud claim is a different cause of action than earlier common law fraud claim. Ansari's 1986 breach of the Termination Agreement certainly was not litigated during the 1984 trial. Nor could it have possibly been litigated then; at that time

Ansari's breach had not yet occurred.

Lary agrees that he cannot relitigate his 1984 common law fraud claim against Ansari or, absent overriding judicial considerations, any other claim that he could have litigated during 1984 trial. But his new common law fraud claim now includes as indispensable element an event that occurred after conclusion of prior action. And his R.I.C.O. conspiracy claim was not litigated and could not have been litigated during trial of prior action. Accordingly, the fourth test for the imposition of res judicata preclusion, the requirement that the "same cause of action must be involved in both cases" is not met for either Lary's conspiracy causes of action or his new common law fraud cause of action here. That fourth element may preclude by res judicata Lary's non-conspiratoral R.I.C.O. claim on grounds that it could have been litigated during prior action, but Lary argues that overriding public policy considerations should allow him to pursue this cause of action as well. (i.e., res judicata may arguably bar Lary's non-conspiratorial R.I.C.O. claim, unless Court decides that public policy considerations are sufficiently strong so as to override bar and allow that claim to go forward, but res judicata cannot properly bar either Lary's R.I.C.O. conspiracy claim or his new common law fraud claim, since neither of these two claims were litigated or could have possibly been litigated in prior lawsuit.)

CONCLUSION

Because the Court of Appeals, among other errors, decided an important question of Federal law (erroneously held that R.I.C.O. conspiracy cause of action is same cause of action as underlying common law fraud claim) wrongly and in conflict with decisions of United States Supreme Court and decisions of other Circuits, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

John H. Lary, Jr., Petitioner
600 St. Clair Street S.W.
Huntsville, Alabama 35801
205/533-1510

CERTIFICATE OF SERVICE

I certify that I have, this _____ day of November, 1987, served three copies of the foregoing upon Stephen E. O'Day, counsel for the Respondent, by United States Mail, postage prepaid, as follows:

Stephen E. O'Day, Esq.
Hurt, Richardson, Garner, Todd & Cadenhead
999 Peachtree Street N.E.
Atlanta, Georgia 30309-3999
404/870-6440

John H. Lary, Jr.